

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

GINA A. PLASSE,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner,
Social Security Administration,
Defendant.

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) C.A. No. 08-357 S
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OPINION AND ORDER

WILLIAM E. SMITH, United States District Judge.

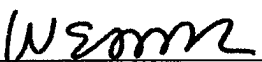
This matter is before the Court on Plaintiff's Objection to the Report and Recommendation of Magistrate Judge Almond issued on September 14, 2009. Magistrate Judge Almond recommended that the Commissioner's Motion for an Order Affirming the Decision of the Commissioner be granted and that Plaintiff's Motion to Reverse the Decision of the Commissioner be denied.

The Court has considered Plaintiff's argument that the Report and Recommendation ("R&R") should not be accepted because the Administrative Law Judge (ALJ) failed to consider whether Plaintiff's Chronic Fatigue Syndrome (CFS) was a medically determinable impairment. However, as Magistrate Judge Almond indicates in his R&R, Plaintiff has the burden of proof, and neither Plaintiff nor her attorney indicated to the ALJ during the hearing that Plaintiff was alleging disability due to CFS. Therefore, the ALJ cannot be faulted for failing to consider whether Plaintiff was disabled based on CFS. See Dalis v.

Barnhart, No. Civ.A. 02-10627-DPW, 2003 WL 21488526 at *7-8 (D. Mass. June 24, 2003) (Court found that ALJ was not required to consider whether claimant was disabled based on a condition when there was little evidence submitted that related to the impairment and neither plaintiff nor his attorney raised the issue during the hearing). Plaintiff also argues that the ALJ's failure to consider her CFS led him to improperly evaluate her residual functional capacity and credibility. As noted by Magistrate Judge Almond in his R&R, however, there is ample evidence in the record to support the ALJ's credibility findings.

The R&R is hereby accepted and adopted pursuant to Title 28 U.S.C. § 636(b)(1). The Commissioner's Motion for an Order Affirming the Decision of the Commissioner is GRANTED and Plaintiff's Motion to Reverse the Decision of the Commissioner is DENIED.

IT IS SO ORDERED.



William E. Smith
United States District Judge
Date: 12/17/09